

1 ground that the proposed discovery was outside the scope of section
2 1054.9, which limits discovery materials to those in the possession
3 of the prosecution and law enforcement authorities to which the
4 defendant would have been entitled at time of trial. Mot, Ex A.

5 Petitioner now renews his motion for leave from this
6 court to serve the requests for discovery on which the state court
7 denied relief. The court finds the matter suitable for decision
8 without oral argument. For the reasons discussed below,
9 petitioner's motion is GRANTED IN PART and DENIED IN PART.

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A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course. See Bracy v Gramley, 520 US 899, 904 (1997). However, Rule 6(a) of the Federal Rules Governing Section 2254 Cases, 28 USC § 2254, provides that the district court "may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Good cause for discovery under Rule 6(a) is shown "'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.'" Bracy, 520 US at 908-09 (quoting Harris v Nelson, 394 US 286, 299 (1969)).

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Before deciding whether a petitioner is entitled to discovery under Rule 6(a), the court must first identify the essential elements of the underlying claim. Bracy, 520 US at 904 (difficulties of proof aside, petitioner's allegation of judicial bias, if proved, would violate due process). The court must then

1 determine whether the petitioner has shown good cause for
2 appropriate discovery to prove his claim. Id. The scope and
3 extent of the discovery permitted under Rule 6(a) is a matter
4 confided to the discretion of the district court. Id at 909.

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6 II

7 In his renewed motion for discovery, petitioner proposes
8 requests to produce files from the Alameda County Superior Court,
9 the Alameda County District Attorney's Office, the Oakland Police
10 Department, the Alameda County Sheriff's Office, the Alameda County
11 Probation Office, the California Attorney General's Office, the
12 California District Attorney's Association, and the California
13 Department of Corrections. Petitioner further proposes to propound
14 interrogatories on respondent seeking information about the
15 practices of the Alameda County District Attorney's Office in cases
16 eligible for the death sentence, and the county's procedures for
17 appointing counsel in capital or homicide cases.

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19 A

20 In document request 7, petitioner seeks training
21 materials used by the Alameda County District Attorney's Office
22 from 1977 to 1984 relating to methods, procedures and/or criteria
23 for selecting jurors in criminal cases. In document request 7.1,
24 he seeks such training materials used by that office "before and
25 after the decision in People v Wheeler, 22 Cal 3d 258 (1978)," from
26 1974 to 1984, showing changes in the methods for selecting jurors.
27 Petitioner contends that these requested documents are relevant to
28 Claim D alleging race-based exclusion of African Americans from the

1 jury in violation of his constitutional rights under Batson v
2 Kentucky, 476 US 79 (1986), and Claim P alleging ineffective
3 assistance of counsel for failing to object on Batson grounds. See
4 also Am Pet, Claim D at 46-47; Claim R at 209. Respondent's
5 contention that the state supreme court denied relief on the Batson
6 claim as procedurally defaulted does not preclude this court from
7 granting discovery upon a showing of good cause.

8 Batson established a three-part test for evaluating
9 claims that a prosecutor used peremptory challenges in violation of
10 the Equal Protection clause. First, petitioner must make a prima
11 facie showing that a peremptory challenge has been exercised on the
12 basis of race. 476 US at 96-97. Second, if that showing has been
13 made, the prosecution must offer a race-neutral basis for striking
14 the juror in question. Id at 97-98. Third, the court must
15 determine whether petitioner has shown purposeful discrimination.
16 Id at 98.

17 To establish the first step under Batson, petitioner, who
18 is African American, alleges that the prosecutor exercised
19 peremptory challenges against fifteen jurors, eight of whom were
20 African American, effectively removing "every African American who
21 was called to the jury box." Am Pet, Claim D at 43. Petitioner
22 also alleges that the prosecutor expressed to defense counsel his
23 intention to strike three additional African American jurors if any
24 of them were called to the jury box. Id at 44. Petitioner further
25 alleges that no members of his race were among the twelve jurors or
26 four alternate jurors. Id. For the purposes of this discovery
27 motion, the court determines that such allegations may give rise to
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1 an inference of discrimination, particularly if supported by
2 additional evidence.

3 In opposition to the motion for leave to conduct
4 discovery, respondent argues that petitioner was arrested in 1983
5 and tried in 1984, rendering overbroad his requests for
6 prosecutorial training materials during the ten-year period before
7 his trial. Respondent further argues that prosecutorial adherence
8 to or divergence from training materials is irrelevant to whether
9 the prosecutor's actual use of peremptory challenges at
10 petitioner's trial violated his constitutional rights. The Supreme
11 Court has held, however, that historical evidence of racial
12 discrimination "is relevant to the extent it casts doubt on the
13 legitimacy of the motives underlying the State's actions." Miller-
14 El v Cockrell, 537 US 322, 336 (2003). There, the defendant
15 presented evidence of the district attorney's policy to exclude
16 minorities from jury service in the form of a circular instructing
17 prosecutors to exercise peremptory strikes against "'Jews, Negroes,
18 Dagos, Mexicans or a member of any minority race.'" Id at 334-35.
19 The Supreme Court noted that although the manual had been written
20 in 1968, it remained in circulation until 1976, or later, and was
21 available to at least one of the prosecutors in the defendant's
22 trial. Id at 335.

23 Here, petitioner has presented evidence that the Alameda
24 County District Attorney's Office conducted professional training
25 of its prosecutors, particularly on the impact of Wheeler, in which
26 the California Supreme Court held that discriminatory use of
27 peremptory challenges violated the right to an impartial jury under
28 the state constitution. Mot, Ex B (Meehan Decl). The court deems

1 reasonable petitioner's request for prosecutorial training
2 documents used as early as 1974, to show whether discriminatory
3 practices existed before, or even after, Wheeler was decided in
4 1978. See Miller-El, 537 US at 347 (evidence suggested that
5 prosecutors were aware of culture of discrimination).

6 In light of his allegations of discriminatory jury
7 selection, petitioner has sufficiently demonstrated that his
8 proposed requests for prosecutorial training materials are
9 reasonably calculated to lead to the discovery of admissible
10 evidence relevant to his allegations of racial discrimination in
11 jury selection. Because an expanded record may show a prima facie
12 Batson violation, shifting the burden of proof to respondent,
13 petitioner has demonstrated good cause for discovery of evidence
14 supporting his Batson claim. Petitioner's motion is therefore
15 granted as to document requests 7 and 7.1.

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17 B

18 Document request 7.2 calls for documents from the Alameda
19 County District Attorney's Office relating to Superior Court Judge
20 Golde. Petitioner asserts that the documents are relevant to Claim
21 I of his federal habeas petition, alleging that Judge Golde made a
22 comment ex parte to a juror about petitioner's failure to testify
23 at trial.

24 To establish a judicial misconduct claim, petitioner must
25 show that the trial judge's behavior "rendered the trial so
26 fundamentally unfair as to violate federal due process under the
27 United States Constitution." Duckett v Godinez, 67 F3d 734, 740
28 (9th Cir 1995). Petitioner's request for the District Attorney's

1 Office's documents relating to Judge Golde is overbroad and is not
2 reasonably calculated to lead to discovery of documents relevant to
3 his claim that Judge Golde acted improperly at petitioner's trial.
4 This matter is distinguishable from Bracy, where the petitioner
5 alleged that the trial judge facilitated a conviction in the
6 petitioner's trial in order to camouflage his own pattern of
7 corruption in other cases where he accepted bribes. 520 US at 905-
8 06. The Supreme Court noted that a general theory of judicial bias
9 and corruption may have been too speculative to warrant discovery
10 without more specific allegations to support Bracy's claim of
11 actual bias in his own case: namely, that the trial judge had been
12 convicted of taking bribes in other cases and that Bracy's trial
13 counsel was a former associate of that judge whose law practice was
14 familiar with corruption. Id at 909.

15 Here, by contrast, document request 7.2 is designed to
16 uncover evidence of Judge Golde's misconduct in matters wholly
17 unrelated to petitioner's due process claims that the judge made
18 improper comments during petitioner's own trial. The possibility
19 of uncovering evidence of Judge Golde's misconduct in other cases
20 is too remote to prove that he committed misconduct in petitioner's
21 case. As Petitioner has not shown good cause, his motion for leave
22 to conduct discovery is denied as to document request 7.2.

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24 C
25 Requests 20, 21, and 22 seek written standards for
26 charging special circumstance and prosecuting capital cases used by
27 the Alameda County District Attorney's Office, the state Attorney
28 General, and the California District Attorneys Association since

1 November 8, 1978. Document requests 27 and 28 seek a list of
2 defendants convicted of murder and voluntary manslaughter in
3 Alameda County from 1978 to 2001 and each of their probation
4 officers' reports. Interrogatories 1 through 4 request information
5 relating to every homicide case prosecuted by the Alameda County
6 District Attorney's Office from 1978 to 1984 in which there was
7 probable cause to believe that one or more special circumstances
8 existed. Petitioner contends that these discovery requests relate
9 to Claim R alleging arbitrary prosecutorial decisions, Claim HHH
10 alleging that the state's death penalty scheme does not assure
11 rational and consistent application of the death penalty, and Claim
12 III alleging that California's death penalty statute fails to
13 meaningfully narrow the class of death-eligible crimes and permits
14 imposition of the death sentence in an arbitrary and capricious
15 manner. Petitioner relies in part on a 1997 study and subsequent
16 declaration by Steven F. Schatz which purport to show that the
17 special circumstances set forth in section 190.2 of the California
18 Penal Code do not genuinely narrow the class of death-eligible
19 crimes, and create a substantial risk of arbitrariness. See Mot,
20 Ex D (Schatz Decl) ¶ 31.

21 As petitioner recognizes, Claims HHH and III are similar
22 to the claims on which discovery has been granted in Ashmus v
23 Ayers, C 93-0594 TEH (ND Cal) and Frye v Ayers, CIV S 99-0628 LKK
24 KJM (ED Cal). While recognizing that petitioner's requests are
25 limited to documents concerning capital cases prosecuted in Alameda
26 County, rather than statewide, the court denies leave to conduct
27 discovery without prejudice in the interest of judicial economy,
28 and defers ruling on good cause for document requests 20, 21, 22,

1 27 and 28 and interrogatories 1, 2, 3 and 4 pending the outcome of
2 litigation on the similar claims presented in Ashmus and Frye.
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4 D

5 In request 23, as modified, petitioner seeks all
6 documents used by the Alameda County District Attorney's Office or
7 any other agency relating to prosecutorial misconduct or
8 indiscretion within that office during the time period that
9 prosecutor Albert Meloling was employed there. Petitioner contends
10 that this request is relevant to his claims alleging prosecutorial
11 misconduct at trial: Claims B, C, D, L, M, R, EE, GG, II, PP.

12 In order to prove his prosecutorial misconduct claims,
13 petitioner must show that the prosecutor's misconduct rendered his
14 trial so fundamentally unfair as to make the resulting conviction a
15 denial of due process. Darden v Wainwright, 477 US 168, 178-81
16 (1986). Petitioner has not adequately demonstrated that his
17 expansive request for all documents relating to misconduct by the
18 District Attorney's Office would assist him in proving that it
19 committed prosecutorial misconduct at his own trial. As petitioner
20 has not demonstrated good cause, his motion for leave to conduct
21 discovery is denied as to document request 23.

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23 E

24 In document request 24, Petitioner seeks complaints and
25 other documents concerning the competence of trial counsel Lincoln
26 Mintz and Harry Traback in representing criminal defendants,
27 contending that such documents are relevant to the following claims
28 of ineffective assistance of counsel: A, P, W, Y, BB, GG, MM, RR.

1 Petitioner further contends that the state had a duty to disclose
2 information about Mintz's or Traback's inability to competently
3 represent petitioner, and seeks documentation to determine whether
4 the state had such knowledge.

5 To prove his ineffective assistance claims, petitioner
6 must meet the two-prong test under Strickland v Washington, 466 US
7 668 (1984). First, he must establish that counsel's performance
8 was deficient, i e, that it fell below an "objective standard of
9 reasonableness" under prevailing professional norms. *Id* at 687-88.
10 Second, he must establish that he was prejudiced by counsel's
11 deficient performance, i e, that "there is a reasonable probability
12 that, but for counsel's unprofessional errors, the result of the
13 proceeding would have been different." *Id* at 694.

14 Request 24 is overbroad and not calculated to lead to the
15 discovery of relevant evidence that would prove petitioner's claims
16 of ineffective assistance of counsel. Neither the state's
17 awareness of trial counsel's professional history, nor trial
18 counsel's conduct in other cases, is relevant to counsel's
19 performance at petitioner's trial. On the question of whether
20 counsel's performance was deficient, the court only considers the
21 reasonableness of counsel's conduct on the facts of petitioner's
22 particular case, viewed as of the time of counsel's conduct.
23 Strickland, 466 US at 690. As petitioner fails to show good cause
24 for discovery, his motion is denied as to document request 24.

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28 In document requests 25 and 26, petitioner seeks written
guidelines and procedures for the appointment of counsel in

1 homicide or capital cases from 1980 to 1985, as well as lists of
2 qualified counsel during the same period. Interrogatories 5, 6 and
3 7 request information relating to appointment and payment of
4 capital counsel by the Alameda County Superior Court. Petitioner
5 maintains these requests are relevant to Claims Q and P alleging
6 ineffective assistance of trial counsel for failing to adequately
7 investigate and prepare for both guilt and penalty phases of his
8 trial.

9 To establish the relevance of his discovery requests,
10 petitioner contends that court-appointed attorneys were not
11 compensated for time spent on out-of-court preparation, and that
12 Mintz failed to adequately prepare for petitioner's capital trial
13 because of this compensation policy. Petitioner has not
14 demonstrated that the procedures of the Alameda County courts in
15 selecting capital defense counsel are relevant to his claims that
16 trial counsel were ineffective in his particular case, nor has he
17 demonstrated that the information regarding selection and payment
18 of counsel would tend to prove that his attorneys' actual
19 performance fell below an objective standard of reasonableness in
20 his case. As petitioner has not demonstrated that the requested
21 discovery would assist him in demonstrating an entitlement to
22 relief, his motion for leave to propound document requests 25 and
23 26 and interrogatories 5-7 is denied.

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25 G
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27 Petitioner has withdrawn document requests 29 and 30
28 relating to Claim NNN, pending litigation in Morales v Tilton,

1 C 06-0219 JF RS. Petitioner shall adhere to the Federal Rules upon
2 any further motion for leave to propound these requests.

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4 III

5 For the foregoing reasons, petitioner's motion is granted
6 as to document requests 7 and 7.1; denied without prejudice as to
7 requests 20-22, 27 and 28 and interrogatories 1-4; and denied with
8 prejudice as to requests 7.2 and 23-26 and interrogatories 5-7.

9 The court directs respondent to file a series of motions
10 for summary judgment on any remaining claims. Respondent shall
11 meet and confer with petitioner's counsel in order to group the
12 claims according to trial phase, e.g., pre-trial, guilt and penalty
13 phase. Respondent shall file the first of these motions within 90
14 days of the date of this order. The court will set the filing
15 dates of the remaining motions in future orders.

16 Petitioner shall file an opposition within 60 days of the
17 date of service of respondent's motion. Respondent shall file a
18 reply within 30 days of the date of service of petitioner's
19 opposition. The parties shall adhere to the page limitations set
20 forth in the court's local rules governing motion practice.

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22 IT IS SO ORDERED.


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24 VAUGHN R WALKER
United States District Chief Judge

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